1976

Tates, Inc. v. Little America Refining Co. : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

TATES, INC.,

Plaintiff - Appellant,

CASE NO. 14415

vs

LITTLE AMERICA REFINING CO.,
A Corporation dba
LITTLE AMERICA,

Defendant - Respondent.

BRIEF OF THE PLAINTIFF - APPELLANT

Review of an Order of the District Court
Honorable Gordon R. Hall, Judge

(Second Appeal-See Case 13681)

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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TATES, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 14415 ~~13681~~
	)	
LITTLE AMERICA REFINING CO., A Corporation dba LITTLE AMERICA,	)	
	)	
Defendant-Respondent.	)	

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BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE AND

DISPOSITION IN LOWER COURT

THIS IS THE SECOND TIME THIS MATTER HAS COME BEFORE THE SUPREME COURT

Plaintiff filed a complaint against defendant for the balance due on a contract for the purchase of a bus. The Court held that the plaintiff's acceptance of a check for an amount less than that due resulted in an accord and satisfaction and dismissed the plaintiff's action and denied recovery by the plaintiff. The Court also denied plaintiff's claim for $845.00 damages to a bus loaned to defendant. There is no dispute concerning the existence of the contract, the original contract price of $28,514.37, nor the amount paid by defendant of $25,107.11. There is no issue involving breach of contract or cancellation

of the contract since both parties sought performance of the contract.

The lower court after the first trial, in an order prepared by Mr. Bird, attorney for the defendant, dismissed the complaint on the basis of an accord and satisfaction and stated

> ". . . and that the complaint of the plaintiff and the counterclaim of the defendant should be and hereby are dismissed with prejudice."

The plaintiff appealed the dismissal of the Complaint but the defendant did not appeal the dismissal of the counterclaim. This Honorable Court issued its unanimous decision reversing the lower Court. The Supreme Court concluded its well reasoned decision of May 15, 1975 as follows:

> ". . . the finding of an accord and satisfaction and the judgement based thereon are in error. The judgement is reversed. Costs to plaintiff/appellant." Tates, Inc. vs. Little America 535 P 2nd 1228.

What happened from that time on is appalling and the illogical results are the reason we are back taking up the time of this Court.

The defendant contended its counterclaim should be reconsidered but after argument on the matter, Judge Hall's memorandum decision of August 21, 1975 stated as follows:

> "The Judgement should be and the same is hereby granted in favor of the plaintiff in the sum of $3,407.26.
> 4. That defendant's counterclaim should not again be considered since no appeal was taken to the Court's prior dismissal of the same."

This memo-decision was in error because it did not provide for interest and attorneys fee.

On September 4, 1975 Judgement was entered in favor of plaintiff and against defendant in the amount of $3,407.26 with no interest or

attorney's fees and costs and the Court ruled it had no jurisdiction to hear the counterclaim the same having been dismissed with prejudice with no appeal therefrom.

On September 12, 1975 the defendant filed a motion for a new trial which motion was argued and the prior evidence stipulated in. The Court, by its Judgement December 30, 1975, handled the counterclaim as a set off allowing plaintiff a recovery of $3,407.26 and the defendant a set off in the amount of $2,992.50. In order to arrive at this judgement the Court committed six (6) errors which are as follows:

1. The court erroneously reinstated a counterclaim dismissed with prejudice through the back door by treating the counterclaim as a set off.

2. The court erroneously found that the plaintiff promised delivery of the bus by the end of November 1972.

3. Apparently the court then erroneously found this so-called promise was in fact, a new contract.

4. The court erroneously found defendants were entitled to compensation for renting a bus between November 30, 1972 and January 16, 1973 and then erroneously found that $2,992.50 was a reasonable rental charge for a bus for 1½ months use.

5. The lower court further errored in not allowing the plaintiff the $845.00 damages to repair its loaner bus and in not allowing plaintiff attorney's fees and interest at the rate of 18% per annum.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to reverse the most recent decision of the lower court and prays for a judgment in its favor for the sum of $3,407.26 plus interest at the rate of 18% per annum from delivery date of the bus January 16, 1973 to present, costs of this proceeding and reasonable

attorney's fees and the sum of $845.00 for damages to its loaner bus with interest at the rate of 6% per annum from November 1, 1972 to date.

STATEMENT OF FACTS

The facts concerning the full transaction are set forth in the plaintiff's previous printed brief pages 2-6. We pray the court review those pages and the arguments set forth in that brief which we make a part hereof by reference.

Since this Court has already ruled in favor of Judgement for the Plaintiff, we address ourselves only to the facts surrounding the counterclaim.

The first step in production of the bus was building the chasis at the Madsen plant. The Madsen plant encountered delays. During this delay period, the representatives of plaintiff and defendant had constant contact. Mr. Knight of defendant company urged delivery and Mr. Knaus of plaintiff company regularly contacted the Madsen company trying to get delivery of the bus (R. 52,61). The defendant did not cancel the contract, but on the contrary continued to affirm the contract and sought delivery as soon as possible.

When Madsen finished its part of the contract, it billed plaintiff for its costs and plaintiff billed defendant for part payment. After some delay and discussions, defendant paid $10,000.00 in a check made out to plaintiff and Madsen dated November 11, 1972 (Ex. 5D). At the time the check was given to plaintiff, Mr. Knaus and Mr. Knight discussed the completion of the bus and in defendants witness, Mr. Knight's own words, "felt confident that we would have the bus by the end of November." (R. 99)

In order to assist the defendant as a courtesy (R. 60) but without being obligated the plaintiff bought a used, exceptionally clean bus in Boise, Idaho brought it to Salt Lake for defendant's use in July,

1972. The bus cost $1,816.00 (R. 57-59). The bus was in good running condition when delivered but was burned up by defendant who had to have it repaired and claims the cost of the repairs against the plaintiff in the amount of $239.76 (Ex. 4D). Bus was returned to plaintiff near December, 1972 with motor completely burned out, costing plaintiff $845.00 which plaintiff claims should be paid by defendant.

After November the defendant rented a bus and claims the plaintiff should pay the cost of renting the bus which the lower court found amounted to $2,992.50.

The new bus was delivered to defendant January 16, 1973 and a delivery receipt and bill was signed by defendant's representative, Dave Timlinson, stating the total price of $28,514.37 and calling for payment of 18% interest, collection costs and attorney's fees if required for collection (Ex. 3P). Mr. Timlinson drove the bus away and that delivery receipt and Tates official billing were sent to defendant on or soon after January 16, 1973. The billing called for payment of a balance of $18,514.37 (Ex. 8D).

The defendants sent a check for $15,107.11 dated February 17, 1973 and received February 21, 1973 holding out $3,407.26. This court considered the matter once and, in effect, said defendants couldn't hold out $3,407.26 giving Judgement to the plaintiff for that amount which makes us wonder why we are back before the Supreme Court again asking for the same thing.

ARGUMENT

POINT I

THE COURT ERRONEOUSLY REINSTATED A COUNTERCLAIM PREVIOUSLY

DISMISSED WITH PREJUDICE THROUGH THE BACKDOOR BY TREATING IT AS A SET-OFF. THERE CAN BE NO SET OFF IN FAVOR OF THE DEFENDANT FOR $2,992.50 SINCE THERE WERE NO PLEADINGS IN THE ORIGINAL ANSWER OR THEREAFTER REQUESTING A SET OFF AND THE COUNTERCLAIM WHERE THE SUM WAS ALLEGED AS A CLAIM BY THE DEFENDANT WAS DISMISSED WITH PREJUDICE.

The Supreme Court held:

> "Accordingly, the finding of an accord and satisfaction and the judgment based thereon are in error."

And then ruled "The Judgment is reversed. Costs to Plaintiff (appellant)." The "judgment is reversed" means the plaintiff should have judgment for the amount of its claim which is the balance due on the account and which amount is undisputed being well supported by the evidence and acknowledged by witnesses of both parties as $3,407.26 as of January 16, 1973. The Supreme Court discussed the claim of defendant for $3,407.26 in detail and apparently considered it without merit. Tates vs. Little America P. 1231.

Contrary to defendant's claim, the trial court did dispose of the counterclaim. The defendant put on its evidence and at the close of the hearing the court stated:

> "The plaintiff's complaint is dismissed, no cause of action and having so disposed of it your counterclaim should also be dismissed, no cause of action."

Mr. Bird made up the findings and judgment which judgment stated in part:

> ". . . and that the complaint of the plaintiff and the counterclaim of the defendant should be and hereby are dismissed with prejudice."

The defendant has had its day in court, presented evidence and had its counterclaim dismissed with prejudice. There was no appeal taken from that order of the trial court so the matter of the counterclaim has been laid to rest.

Rule 41(b) states in part:

> "Unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

Black's Law Dictionary defines dismissal and dismissal with prejudice as follows:

> DISMISSAL. An order or judgment finally disposing of an an action, suit, motion, etc., by sending it out of court, though without a trial of the issues involved. Brackenridge v. State, 27 Tex. App. 513, 11 S.W. 630, 4 L.R.A. 360. The term is often used to indicate an adjudication on the merits. Knox v. Crump, 15 Ga. App. 697, 84 S.E. 169, 173; Butler v. McSweeney, 222 Mass. 5, 109 N.E. 653,655.
>
> DISMISSAL WITH PREJUDICE. An adjudication on the merits and final disposition, barring the right to bring or maintain an action on the same claim or cause. Pulley v. Chicago, R.I. & P. Ry. Co., 122 Kan. 269, 251 P. 1100, 1101. It is res judicata as to every matter litigated. Roden v. Roden, 29 Ariz. 549, 243 P. 413, 415. A judgment of dismissal and a judgment of nonsuit have the same legal effect. Suess v. Motz, 220 Mo. App. 32,285 S.W. 775, 776.

In the 1972 Utah case Steiner v. State, 27 U. (2d) 284, 495 P. 2d 809 this Court held:

> "An order to dismiss with prejudice and on the merits is final adjudication of the issues and the time for appeal under Rule 73 begins to run upon entry of the order."

There is a substantial difference between a set-off (or recoupment) and a counterclaim.

> "United States Plywood Corp. v. Hudson Lumber Co. (SD NY 1955) 17 FRD 258, 262, 21 FR Serv. 12f. 26, Case 1 'There is a marked distinction between recoupment and a counterclaim which the plaintiff has apparently failed to note. Recoupment does not seek an affirmative judgement. It is defensive.'".

Likewise a counterclaim cannot be automatically converted into a set off or recoupment.

Some authorities seem to indicate that there is some interchange of meaning between counterclaim and a defense. 20 Am Jur 2nd 228 discussing Counterclaim, and set off where the courts seem to take the view that a

set off can be considered a counterclaim or that a counterclaim can be considered a set off the defendant is out of court because once the counterclaim fails or is dismissed with prejudice then the set off is gone too. In other words, while the claim is still alive the court has some leeway in treating it as either a defense or a counterclaim but once the claim is finally dismissed it cannot be resurrected under a new name and come back to life. You can't get life out of a dead tree by merely transplanting. The lower court may claim some divine powers but its effort to resurrect a dead claim can only be black magic to which deceptive powers we are sure this court will not succumb.

Many authorities talk about set off and counterclaims having alternative effect - 81 ALR 781, 46 ALR 393, 53 ALR 708.

Rule 8(c) names all affirmative defenses but does not name a set off as a defense but says defenses can be treated as a counterclaim and visa versa.

The Court, in our case, as well as plaintiff and defendant considered set off as the counterclaim. Rule 13 says defendant must state all claims in its counterclaim and Rule 12(b) says about the same thing. Logan City vs. Utah Power, 86 Ut. 340, 10 P. 2nd 1097 states if a party fails to state a claim resulting judgment is conclusive against it as to all matter of defense.

Mr. Bird made up the original Judgment and without reserving any rights incorporated in the judgment a dismissal with prejudice of the counterclaim and with it any so called set off. There was no appeal on that ruling and the judgment for plaintiff became final as a matter of law. There could not be an off set later on.

POINT II

THE COURT ERRONEOUSLY FOUND THAT THE PLAINTIFF PROMISED DELIVERY OF THE BUS BY THE END OF NOVEMBER, 1972.

The record repeatedly shows the plaintiff never promised but merely had hopes delivery could be made by the end of November, 1972. On cross examination Mr. Knaus stated:

> "Q. What did you tell? (To Mr. Knight)
> A. Well, to the best as to what the factory was telling me we could deliver in a certain length of time and I'm not sure that I know the date that you're referring to because there were several times in there." (R. 62)

Does this sound like a promise? Does this establish a delivery date? All the way through when addressing this subject Mr. Knaus would relate to Mr. Knight what the factory said. Mr. Knaus again (R. 53) stated:

> "A. Yes, I referred to the delivery of this unit to the best of our knowledge as whatever - - I would have to go back and check now what we stated we could do from the factory telling us what they could do."

Does this sound like a promise?

Mr. Knight (defendants witness) testified that Mr. Knaus:

> "Said that he had spoken to the people at Ward and he had talked with someone who was in authority at Ward and that he felt good about the answer he had received; and for the first time he felt confident that we could have the bus by the end of November." (R. 99)

And on cross examination when asked if Mr. Knaus had thought the bus would be available, Mr. Knight testified:

> "More strongly than that - he said he was confident the bus - - he was confident and sure that it would be available at the end of November." (R. 124)

Do any of these bits of testimony amount to a promise? The answer is obviously, No!

POINT III

APPARENTLY THE COURT THEN ERRONEOUSLY FOUND THIS SO-CALLED

PROMISE WAS A NEW CONTRACT WHEN, IN FACT, THERE WAS NO NEW CONTRACT. THE COURT ERRORED IN ALLOWING DEFENDANT'S COST IN RENTING A BUS BE ASSESSED AGAINST THE PLAINTIFF.

There is absolutely nothing in the agreement between the parties that would permit defendant to claim damages against the plaintiff for a delay in delivery. Some contracts are written that way but this contract did not provide for relief if delivery was not made as required. As stated before no new contract was entered into. Mr. Knight arbi trarily set December 1, 1972 as some sort of cut off date and unilaterally agreed with himself that this was a good time to start assessing charges. Apparently he based this on the fact that Mr. Knaus thought, after checking with the factory, that the bus would be ready for delivery the last of November. Mr. Knaus made no promises, no guarantees and no agreements; he merely told Mr. Knight that he "felt confident" it could be delivered near the last of November. There was no agreements, oral or otherwise, or any other basis upon which defendant could base a claim.

The law of contracts is so clear it hardly needs argument or citation of authority. All of the following sections are from the Restatement of Contracts. Restatement of Contracts Sec. 19 states in part:

> "The requirements of the law for the formation of an informal contract are:
>
> (b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise . . .
>
> (c) A sufficient consideration . . ."

Section 20 - "A manifestation of mutual assent by the parties to an informal contract is essential to its formation ..."

Section 22 - "The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties".

The original written offer and acceptance is the only contract and is the best evidence. The defendant was already committed to pay a full $28,514.37 - it was already committed to pay the $10,000 and much more. Certainly a new contract cannot be found when a party promises to pay something which he is already committed to pay - this could not be good consideration.

Section 75 comment (a) under consideration states:

> "No duty is generally imposed on one who makes an informal promise unless the promise is supported by sufficient consideration."

> Section 76 - "any consideration ... is sufficient ... except the following:

> (a) an act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or the public ..."

Obviously there was no new contract requiring plaintiff to deliver a bus before December 1, 1972.

POINT IV

THE COURT ERRONEOUSLY FOUND DEFENDANTS WERE ENTITLED TO COMPENSATION FOR RENTING A BUS BETWEEN NOVEMBER 30, 1972 AND JANUARY 16, 1973 AND THEN ERRONEOUSLY FOUND THAT $2,992.50 WAS A REASONABLE RENTAL CHARGE FOR A BUS FOR 1½ MONTHS USE.

How unfair could the Court be?

Because of the defendant's concern about its need during the summer for another bus the plaintiff located a bus in Boise, Idaho, bought it for $1,816.00, drove it to Salt Lake City and turned it over to defendant for its use without charge in July, 1972 (R. 57-59, 120)

There was no obligation by contract to provide the bus; it was turned over to Little America strictly as a courtesy without charge. (R. 60, 98)

The defendant returned the bus in about December, 1972 in such poor condition that it had to have a complete motor overhaul at a cost to

plaintiff of $845.00. (R. 80) The defendant never so much as questioned this cost at the trial and yet the lower Court completely ignored the claim as originally set forth in plaintiff's Reply.

The bus traveled 250 miles a day. (R. 112, 113) It traveled during the heaviest traffic time during the busiest and hottest time of the year. (R. 119) Driving a bus fully loaded in the heat of the summer 250 miles a day is extremely heavy use and very hard on any type of equipment. The defendant surely knew they must at least repair the vehicle if they received the equipment, tires, etc. free of charge. They would have to repair their own equipment as part of their operating expense surely the court cannot hold the plaintiff to repair the equipment when it had been turned over to defendant for use as its own without charge. The defendant literally burned up the motor and then demanded the plaintiff pay for sum $239.76 for motor repairs near the end of November, 1972. The cost of these repairs were assessed against the plaintiff by the lower Court in the first Judgement but rejected the claim in its second Judgement.

Now after using the plaintiff's bus free for five months and burning it up the defendant charged the plaintiff for renting a bus for December 1, 1972 through January 16, 1973 and then claimed the rental charge was $2,000.00 per month. What a ridiculous charge - if the plaintiff decided to charge the defendant $2,000.00 a month for using the bus the defendant would owe plaintiff $10,000.00. This would mean a years rental on a bus would cost $20,000 which is almost the purchase price of a new bus. If we took Mr. Knight's higher figure of $75 per day on a 7 day week operation the defendant would have paid out $27,375 a year.

The court allowed testimony on costs of operating a bus and testimony on the reasonableness of such cost from Mr. Knight who was shown by the Voir Dire questions of plaintiff's attorney to not be qualified as a sufficient expert to do so. (R. 107) The witnesses basis for computing costs was completely erroneous.

Mr. Knight is a business man, an office man (R. 108) with offices principally in Salt Lake City. Little America has a manager in Wyoming who takes charge of the buses, dispatches them and sees that buses are available, fueled and repaired. This Wyoming Manager also arranged for the rental of buses. (R. 107) Mr. Knight's testimony concerning costs was allowed over the objections of the plaintiff. (R. 108) The witness was clearly mixed up in referring to costs of operating and costs of renting a bus. The court cannot from the evidence here determine how charges should be assessed even if they were justified. (R. 112, 114) There is no competent evidence in the record. Mr. Knight stated the 22 to 25 cents per mile he was charging the plaintiff included fuel and oil (R. 114). It should be obvious to the court that fuel and oil would have to be paid by the defendant if it was using its own bus. The cost of fuel should not have been assessed against plaintiff. This shows defendants' figures are all off because Mr. Knight arrived at his $62.50 per day figure by multiplying 25¢ per mile times 250 miles per day. Though the testimony was $62.50 per day somehow the Court comes out with a set off of $2,992.50 for 1½ months.

The Court obviously was taken in and errored grieviously. The true test for a bus rental cost as any high school student would know is the actual rental cost to lease a bus by the month. Though the figure was never put in the record it would be somewhere between $200-$500 per month

and the leasee puts on his own driver and pays fuel and repair costs. AS THE RECORD STANDS THERE IS NO COMPETENT EVIDENCE TO JUSTIFY A FINDING OF RENTAL COSTS.

POINT V

THE LOWER COURT FURTHER ERRORED IN NOT ALLOWING THE PLAINTIFF THE $845.00 DAMAGES TO REPAIR ITS LOANER BUS AND IN NOT ALLOWING PLAINTIFF ATTORNEY'S FEE AND INTEREST AT THE RATE OF 18% PER ANNUM.

The defendant returned the bus in about December, 1972 in such poor condition that it had to have a complete motor overhaul at a cost to plaintiff of $845.00 (R. 80) The defendant never so much as questioned this cost at the trial and yet the lower Court completely ignored the claim as originally set forth in plaintiff's Reply. This fact and the fact the Court struck out of the plaintiff's proposed order all interest - not even simple interest of 6% shows the Court acted on some kind of passion and prejudice. The further fact the lower court refused to allow attorney's fee is further evidence that the court may not take kindly to being overruled. We base our claim for attorney's fee and 18% interest from the date the bus was delivered, January 16, 1973, on the following statement on the delivery receipt Exhibit 3P signed by the authorized agent of defendant.

> Terms are Cash on Delivery. Estimates are for Labor only. Materials and Parts extra. We will not be responsible for any loss by fire or theft beyond our control. Vehicles being road tested are done so at owner's risk. Interest will be charged on all past due accounts computed at the periodic rate of 1½% per month, which is a per annum rate of 18%. Purchaser also agrees to pay collection costs, including court cost and reasonable attorney fees if collection is required.
>
> Received By: /s/ Dave Timlinson

The defendants accepted delivery of the bus on January 16, 1973, (R. 64) by sending a duly authorized representative as conceded by counsel

for defendant, Mr. Bird, who stated: "Admit he got into the bus and drove away also admit he was our employee for that purpose." (R. 78)

Mr. Urie was present when bus was delivered. Mr. Timlinson, who picked up the bus, stated he was an employee. He signed the original of the Exhibit 3 combination invoice, billing and delivery receipt as an agent and "Took delivery of the bus and left our premises". (R 77, 78) There was no objection to the billing for $28,514.37 at the time of delivery. Exhibit 8d shows the billing as of January 16, 1973 as $18,514.37 reduced to $3,407.26 as of February 21st. Actually 18% interest on $18,514.37 for the period January 16th to February 21st would be about $280 with 18% on $3,407.26 from February 21, 1973 compounded annually until finally paid. The defendant was billed monthly thereafter similar to the bill Exhibit 8d and each bill carried the following note:

> INTEREST will be CHARGED on all past due accounts computed at the PERIODIC RATE of 1½% PER MONTH, which is a PER ANNUM RATE of 18%. Purchaser also agrees to pay collection costs, including court cost and reasonable attorney fees if collection is required.

Surely these documents put the defendant on notice as to what interest rates would have to be paid if he didn't pay his bill and that costs and attorneys fee would have to be paid if collection was required. When this Court did not mention interest and attorney's fees in its last reversal the defendant argued that it meant we were not entitled to such an award.

We respectfully request the Court specifically order that the plaintiff is entitled to 18% interest on $18,514. from January 16, 1973 until February 21, 1973 and thereafter 18% interest on $3,407. compounded annually until paid together with costs and reasonable attorney's fee which

would now be at least $2,500 and further that the defendant pay to Plaintiff $845.00 damages at the rate of 6% interest compounded annually until paid. If such a specific order is not entered by the Court, judging from past performance in the lower Court, we will end up in another appeal to this Court in regards to interest and attorney's fees.

WHEREFORE we pray the Honorable Court again reverse the lower Court in its finding of a set off and find the defendant owes plaintiff $3,407.26 plus interest at the rate of 18% as set forth above in addition to the sum of $845 plus interest and reasonable attorneys fees of $2,500.00.

DATED this 17th day of March, 1976.

Respectfully Submitted

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